SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1654

LEONA LEE CORPORATION, a corporation, INSULATION AND SPECIALTIES, INC., a corporation, and JACK TILLERY, an individual,

Petitioners,

versus

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 66, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners-Defendants, Leona Lee Corporation, a corporation, Insulation and Specialties, Inc., a corporation, and Jack Tillery, an individual, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, said Court's opinion and judgment being dated February 22, 1974, and the Petition for Rehearing filed by Ap-

pellants having been denied by said Court of Appeals on March 26, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth is reported at ____ F.2d ____ (not yet reported) and is copied in Appendix A, infra, pp. 1a-3a. The case was submitted, with oral argument, on December 3, 1973, and the opinion was handed down on February 22, 1974.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on February 22, 1974, and Appellants' Petition for Rehearing was denied by said Court on March 26, 1974, and a copy of the judgment of said Court is appended to this Petition in Appendix B, infra, pp. 4a-5a, and the Order denying said Petition for Rehearing is appended to this Petition in Appendix C, infra, p. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Rule 19,1(b), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The questions here presented are whether Petitioners, who were employers with collective bargaining agreements with Respondent Union and one of its sister unions,

(1) could quit business during the term of said agreements without being liable to Respondent Union for damages occurring thereafter; and,

(2) whether after the expiration date of the term of said agreements, Petitioners owed Respondent Union a duty to continue in business and to continue to comply with the terms of said expired agreements, so that Petitioners, on quitting business, were liable for damages occurring after they had quit business, and also after the expiration date of the term of said collective bargaining agreements.

The further question is presented, whether a Court should refuse to set aside an Arbitrator's decision and award where the Arbitrator decided an issue not submitted to him, and also where he decided a question of law erroneously, so as to be a palpable error in manifest disregard of the law. The Court of Appeals upheld a judgment enforcing an Arbitrator's award, which assessed damages in favor of Respondent Union, and against Petitioners, for the Union's loss of dues and loss of bargaining power occurring after Petitioners had quit business, and after the expiration date of the term of said collective bargaining agreements.

Although these questions were not among the issues submitted to the Arbitrator, (A.I. 11-3), nevertheless the Arbitrator held that Petitioners, in quitting business, breached the collective bargaining agreement with Respondent Union, and that their duty and con-

tractual obligations to Respondent Union continued after the expiration of the term of said collective bargaining agreement, (R.94-16), and then assessed against Petitioners damages which occurred after the expiration of the term of the collective bargaining agreement, and after Petitioners had quit business. (R. 84, Ex.I, p. 26).

This case originated in a suit filed by Respondent against Petitioners, and after Respondent filed its First Amended Bill of Complaint, (A.I.7), the Court ordered the issues alleged in said Amended Complaint submitted to the Trade Board and arbitration procedures of the Local 66 Collective Bargaining Agreement, (A.I. 111), and the arbitration followed. The issues alledged in said Amended Complaint related to jobs and work done by Leona Lee, Inc.; failure of Petitioners to comply with the terms and conditions of local employment practices; failure to close a fabricating shop; performance of work through another company; and failure to comply with terms of the Settlement Agreement, (A.I. 7). These issues do not include an issue on the right of Petitioners to quit business, or on Petitioners' duty to continue in business after the expiration of the term of the Collective Bargaining Agreement. It was these last two issues, which were not in the submission, which the Arbitrator decided, and on which his award against Petitioners is based.

The Arbitrator's award, therefore, is not valid, because it violates the well recognized rule that an Arbitrator's award on a question not submitted to him is void. The award also is not valid because it is based

on a decision of a question of law, by the Arbitrator, which clearly misconceives and misapplies the law, is in manifest disregard of the law, and constitutes a palpable error.

THE LAW INVOLVED

The decision of the Court of Appeals — and the Arbitrator's award — involve the rule of law relating to the right of an employer to quit business prior to the expiration date of a collective bargaining agreement with a labor union. The employer can quit, if he quits completely, so far as the N.L.R.A. is concerned, *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 13 L.Ed.2d 827, and he can quit prior to the expiration date of the term of such agreement, *Fraser v. Magic Chef-Food Giant Mkts., Inc.*, 324 F.2d 853 (6th Cir.), and other cases hereinafter cited. The Arbitrator, however, held to the contrary, which is a palpable error, in manifest disregard of the law.

It also involves the rule that after the expiration date of the term of an agreement, no further obligations exist between the parties — in the absence of the agreement specifying otherwise —, and one party is not liable to the other for damages alleged to have occurred after such expiration date. The Arbitrator awarded large damages which occurred long after the expiration date of said agreements, which also is a palpable error, in manifest disregard of the law.

It also involves the rules (1) that an Arbitrator's decision of an issue not submitted to him is void, and

(2) that an award based on a decision of a question of law, which is made in manifest disregard of the law, and which is a palpable error, will be set aside.

The Court of Appeals held it could not set aside an Arbitrator's award under any circumstances, and in that respect is in error, in not applying the rules relating to that point, and which are hereinabove set cut.

STATEMENT

Petitioners and Respondent were parties to a Settlement Agreement dated March 15, 1966, settling controversies then existing between them, (A.I. 16). This agreement required Leona Lee, Inc. to go out of business, and required Insulation and Specialties, Inc. to sign a collective bargaining agreement with Local 22, Houston, Texas, (A.I. 16,17; 18-20). The Local 22 agreement was for a term ending June 30, 1968, and required Insulation and Specialties, Inc. whenever and wherever working in the territory of a sister local (such as Local 66) to abide by the collective bargaining agreement of the sister local with contractors in that area. The Local 66 collective bargaining agreement, to which Petitioners were not signatory, was also for a term ending June 30, 1968, (A.I. 18-20).

Leona Lee, Inc. transferred its assets to Insulation and Specialties, Inc., and in 1967 Insulation and Specialties, Inc. quit business, and sold its assets. Petitioner Tillery, the chief executive officer of the two corporations, went to ranching, and later went to Aus-

tralia where he was in the insulation business in 1968, 1969 and 1970, (R. 94-13-5; R. 107-362-364).

The Court of Appeals, by affirming the arbitration award, has held that Petitioners could not quit business without breaching the collective bargaining agreements, and their duty thereunder to Respondent Union, although the agreements contained no provision requiring Petitioners to stay in business, (R. 94-16,17). The said Court also held, affirming the Arbitrator, that Petitioners were liable to Respondent Union for damages which the Union claimed occurred in the last half of 1968, and in the years 1969, 1970 and 1971, all long after Petitioners had quit business, and all long after the termination date of said agreements. (A.I.34; P. 84, Ex.C. Art.XU; R.84,Ex.I, p.23-4,26).

The issue submitted to the Arbitrator for decision did not include any issue on the Petitioners' right to quit business, or on Petitioners having any liability to Respondent Union for anything occurring after June 30, 1968, the termination date of the collective bargaining agreements. The decision by the Arbitrator of these issues, which were not submitted to him, is clearly void, as under the law the Arbitrator cannot decide an issue not contained in the submission.

The submission order by the Court, dated October 14, 1969, (A.I. 11-3), directed the arbitration of the issues in Respondent's First Amended Bill of Complaint, and these two issues are not contained in said Amended Bill of Complaint. The United States Arbitration Act provides for vacating an award "where the Arbitrators

exceeded their powers", which includes deciding issues not contained in the submission, 9 U.S.C.A. §10(d), and the rule is set out among other places in *Refinery Employees Union v. Continental Oil Co.*, 268 F.2d 447 (5th Cir.) cert. denied, 80 S.Ct. 199; *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir.) cert. denied, 24 L.Ed.2d 500; and *Gulf Oil Corp. vs. Guidry*, 160 Tex. 139, 327 S.W.2d 406 (1959).

It is also recognized that while an Arbitrator's decision on both the facts and the law, of an issue submitted to him is binding on the parties, nevertheless it is also well recognized that an Arbitrator's decision made in manifest disregard of the law, and which constitutes a palpable error, will be vacated. The injured party is entitled to no less, because under these circumstances his settled legal rights have been overridden and destroyed by an arbitrary decree of the Arbitrator.

That an employer can quit business entirely, is held in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 13 L.Ed.2d 827, which was an unfair labor practice case under the N.L.R.A.

With respect to the right of an employer to quit business during the term of a collective bargaining agreement, the authorities hold he can quit. The general rule is stated in 51 C.J.S. "Labor Relations" §340 stating that in the absence of an agreement to the contrary, a collective bargaining agreement does not re-

quire the employer to continue in business for the period of the contract.

The leading case on the exact point is *Fraser v. Magic Chef-Giant Mkts., Inc.*, 324 F.2d 853 (6th Cir.), where employer closed a plant during the term of a collective bargaining agreement, and in a suit brought by an employee to recover wages alleged to have accrued after the plant closed, the Court said there is no merit to the argument of Appellant that because the company was not given the express right to discontinue operations in this clause of the contract, the right (to discontinue business) did not exist. The Court approved the statement by the trial Judge that, "It would seem elementary draftsmanship to state in very clear terms any provisions whose operation would depart so radically from common practice as the interpretation which plaintiff urges here." The Court specifically held that the collective bargaining agreement contained no provision which could be interpreted as a limitation on the right of the company to discontinue business and to close its Cleveland plant, and that the defendant therefore was not liable to plaintiff.

The *Magic Chef* case is cited also in *American Bakery & Con. Wkrs. Int'l. Union vs. Liberty Baking Co.*, 242 F.Sup. 238, and in *International Union, etc. vs. Hamilton Beach Mfg. Co.*, 40 Wis.2d 281, 162 N.W.2d 16, at 22. To the same effect is *Tarr vs. Amalgamated, etc.*, 250 Pac.2d 904 (Idaho, 1952).

The Arbitrator's holding that Petitioners breached the "Settlement Agreement" by "quitting business"

was the only finding upon which damages for "loss of dues" and "loss of bargaining power" was predicated, and these are the basis of his award in favor of Respondent and against Petitioners. In each instance, the Arbitrator allowed damages for such items subsequent to the date Petitioners actually "quit business", and subsequent to June 30, 1968, when said agreements expired, and in fact down to the time of the last hearings in 1972, (R.94, 94-23-6). The result is that Petitioners have been mulcted in damages for damages allegedly occurring long after they had quit business. This holding denies Petitioners their right to quit business, and holds, in effect, that they must continue in business indefinitely down through the years, certainly until 1972 when the last damages occurred that were contained in the Arbitrator's award.

REASONS FOR GRANTING THE WRIT

The Court below has held an Arbitrator's award cannot be set aside, even though it decides an issue not contained in the submission, and in affirming the judgment enforcing the award; and has held an employer who has a collective bargaining agreement with a labor union cannot quit business without being liable to the union for damages thereafter occurring. The Court held, in addition, that the employer was liable for damages occurring long after the collective bargaining agreements expired.

That an employer has the right to quit business entirely, and can do so during the term of a collective bargaining agreement — which contains no specific

provision to the contrary — is fundamental in the law, and is basic to the rights of all employers. The decision below to the contrary, if allowed to stand, not only takes from Petitioners a large sum of money in damages contrary to the established law, and their rights under the law, but said decision can also constitute a precedent by which the right of an employer to quit business can be undermined, and he be required to continue in business, regardless of the circumstances which might otherwise impel him to quit business. This is such a basic right that the erroneous decision below, which is destruction of that right, needs to be corrected, and reversed, by this Honorable Court.

Along with the right to quit business is the right not to be held liable for damages arising after he quit, and which also arose after the expiration of said collective bargaining agreements. An employer is not liable for damages occurring after a collective bargaining agreement has expired, but in this case Petitioners have been held liable for damages which occurred long after the expiration date of the collective bargaining agreements. That judgment not only takes from Petitioners a large sum of money in damages arising after the expiration of the agreements, contrary to established law, and their rights under the law, but it is also an opening wedge to establishing a rule that employers can be adjudged liable in damages to a labor union for things occurring long after a collective bargaining agreement has expired. If this is to be the law, the dimensions of an employer's liability under a collective bargaining agreement will have been ex-

panded greatly beyond what, up to this time, it has been.

This Petition for a Writ of Certiorari therefore should be granted so that this Honorable Court can authoritatively state and hold that, absent a specific agreement to the contrary, an employer can quit business entirely, during the term of a collective bargaining agreement; and that the employer is not to be held liable for damages arising both after he quit business and after the expiration of the collective bargaining agreement.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

_____

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing brief has this date been served upon opposing counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

_____

APPENDIX A

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 66, AFL-CIO,
Plaintiff-Appellee,

versus

LEONA LEE CORP., Insulation & Specialties, Inc., and Jack Tillery,
Defendants-Appellants.

No. 73-1784.

United States Court of Appeals,
Fifth Circuit.

Feb. 22, 1974.

Appeal from the United States District Court for the Western District of Texas.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

[1] In November of 1970, this court affirmed an order of the United States District Court for the Western District of Texas ordering arbitration between the Leona Lee Corporation and the International Association of Heat and Frost Insulators and Asbestos Work-

ers, Local 66, AFL-CIO.[1] Arbitration took place. The union sought and was granted enforcement of the arbitrator's award by the district court. The Leona Lee Corporation now appeals that enforcement order. We affirm the well-reasoned decision of the lower court.

The factual background leading up to the arbitration order is clearly set out in our prior opinion and need not be fully repeated here.[2] On January 20, 1970, the matter was submitted to the Trade Board in Amarillo, Texas, pursuant to the district court order. The Trade Board deadlocked; therefore, an arbitrator was appointed by the parties in accordance with the district court's order. Arbitration hearings began on January 12, 1972; 1,300 pages of testimony were taken, numer-

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[1]See 434 F.2d 192 (5 Cir. 1970).

[2]The appellant-employer, Leona Lee, entered a labor contract with the appellee-union, International Association of Heat & Frost Insulators and Asbestos Workers, Local 66. Local 66 later filed suit for breach of contract, alleging payscale discrepancies. The suit was settled and the parties entered into an agreement on March 15, 1966. That agreement provided that Leona Lee, a non-union contractor, would transfer all of its assets to I & S, a union contractor, who would then sign a collective bargaining agreement with a different local of the Asbestos Workers Union. The transfer of assets took place and a collective bargaining agreement was signed. I & S then transferred all of its assets to other newly formed non-union companies and went out of business. Local 66 filed suit in 1967, contending that Leona Lee violated the settlement agreement by transferring its assets to I & S, who then went out of business. The district court determined that the matter should be submitted to the Trade Board and if not resolved there, to an arbitrator. Leona Lee appealed this decision, and the Fifth Circuit affirmed the district court. The Trade Board deadlocked. The arbitrator then awarded damages of approximately $45,000 to the union. The district court upheld this award. Leona Lee then appealed to the Fifth Circuit.

ous exhibits of varying lengths were presented, and both sides filed two sets of briefs. Nineteen months later, the arbitrator rendered his decision in favor of the union. The district court wrote a knowledgeable 25 page memorandum opinion enforcing the arbitrator's decision. The corporation appeals, alleging six specific erros by the court below.

[2] In a suit to enforce an arbitration award, the court's role is very narrow. It cannot review the merits of the award, even in deciding the question of arbitrability, nor can the court attempt to interpret the collective bargaining agreement. United States Steel Workers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Insofar as the arbitrator's decision concerns interpretation of the collective bargaining agreement, the courts cannot overrule the arbitrator because their interpretation of the agreement is different or because they disagree with the arbitrator's fact findings. International Brotherhood of Pulp, Sulphite & Papermill Workers v. St. Regis Paper Company (5 Cir. 1966), 362 F.2d 711.

This court has carefully reviewed all of Leona Lee's contentions of error and finds none of those six contentions to have merit. The decision of the district court is hereby

Affirmed.

APPENDIX B

JUDGMENT

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-1784

D. C. Docket No. CA 67-11-EP

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 66, AFL-CIO,
Plaintiff-Appellee,

versus

LEONA LEE CORP., INSULATION & SPECIALTIES, INC., and JACK TILLERY,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before RIVES, WISDOM and MORGAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: February 22, 1974

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1784

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 66, AFL-CIO,
Plaintiff-Appellee,

versus

LEONA LEE CORP., INSULATION & SPECIALTIES, INC., and JACK TILLERY,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

March 26, 1974

Before RIVES, WISDOM and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.